Supreme Court, U.S.
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No. 03-484

In The
Supreme Court of the United States

CAMPUS COMMUNICATIONS, INC.,

Petitioner,

v.

TERESA EARNHARDT, THE ESTATE OF DALE EARNHARDT, DALE EARNHARDT, JR., TAYLOR EARNHARDT, DALE EARNHARDT, INCORPORATED, COUNTY OF VOLUSIA, OFFICE OF THE MEDICAL EXAMINER, THE STATE OF FLORIDA, AND MICHAEL URIBE,

Respondents.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fifth District

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI OF TERESA EARNHARDT, THE ESTATE OF DALE EARNHARDT, DALE EARNHARDT, JR., TAYLOR EARNHARDT AND DALE EARNHARDT, INCORPORATED

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CORPORATE DISCLOSURE STATEMENT

Dale Earnhardt, Incorporated does not have a parent or publicly held company owning 10% or more of the corporation's stock.

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INTRODUCTION

The petition of Campus Communications, Inc. ("Campus") should be denied because this is a *state* law case involving the tension and balance between two provisions of *state* constitutional law – the Florida constitutional provision protecting personal privacy (Article I, Section 23, Florida Constitution) and the Florida constitutional provision endorsing inspection and copying of public records (Article I, Section 24, Florida Constitution). Campus raised two issues on appeal to the state's intermediate appellate court: whether the Florida statute restricting the public release of autopsy photographs absent a showing of good cause was constitutional under the Florida Constitution; and whether the statute could be applied retroactively under Florida constitutional law to prohibit the release of the autopsy photographs of Dale Earnhardt. (R.App. 24-25).[1] Campus did not properly present any federal constitutional issues to the state courts, and no federal constitutional issues were addressed by any of the three state courts below. (App. 1-48).

Teresa Earnhardt and her family became involved in the case below following the tragic death of her husband, racecar driver Dale Earnhardt, during the Daytona 500 in February 2001. An autopsy was performed on Dale Earnhardt, as required by Florida law, resulting in a very detailed autopsy report and thirty-three autopsy photographs. (App. 3). The autopsy report was released to the public. (App. 3). A written evaluation of the autopsy by an

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[1] The Appendix submitted by Petitioner with its petition is referred to as "App. ___." The Appendix submitted by the Respondents simultaneously herewith will be referred to as "R.App. ___."

independent court-appointed expert was also released to the public. (App. 11). Nonetheless, the press and others made demands under Florida's public records law for release of the autopsy photographs. (App. 4). In March 2001, the Florida Legislature adopted Ch. 2001-1 (the "Florida Act," codified at Fla. Stat. § 406.135, App. 49-54), which requires that the autopsy report remain a public record for public inspection and copying; the Act also, relying upon legislative findings as to the devastating impact on the survivors resulting from public inspection and copying of the autopsy photographs of their decedent, prohibits the inspection and copying of such photographs absent a showing of good cause before a court. Teresa Earnhardt and her family have been involved in resisting efforts to obtain her husband's autopsy photographs and in defending the Florida Act against challenges by the press.

OPINIONS BELOW

Campus Communications, Inc. v. Earnhardt, 821 So. 2d 388 (Fla. 5th DCA 2002) (App. 1), *pet. for rev. den.*, 848 So. 2d 1153 (Fla. 2003) (App. 47); *Earnhardt v. Volusia County, Office of the Medical Examiner*, No. 2001-30373-CICI, 2001 WL 992068 (Fla. Cir. Ct., July 10, 2001) (App. 28).

RESPONSE TO JURISDICTION

The Florida District Court of Appeal entered its judgment on July 12, 2002. This judgment neither addresses nor passes upon any federal constitutional issues. (App. 1-27). Although the District Court of Appeal, an

intermediate court, is the court of last resort as a matter of right for nearly all civil cases, Campus filed a petition seeking discretionary review of the District Court of Appeal's judgment by the Florida Supreme Court on July 22, 2002 in accordance with certain certified questions of Florida law. The Florida Supreme Court declined to exercise its discretionary jurisdiction, denying Campus' petition on July 1, 2003. (App. 47). Petitioner then filed this petition seeking review of the judgment of the District Court of Appeal by this Court pursuant to 28 U.S.C. § 1257(a).

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Campus is bound by the extensive findings of fact made by the trial court and affirmed on appeal by the District Court of Appeal. Campus has ignored these findings, and has misconstrued the case and the record below in several significant respects.

First, Campus never properly presented and pursued its alleged federal law claims. Indeed, a review of the record shows that the trial court and the District Court of Appeal focused exclusively on state constitutional claims because they were what Campus argued and presented to those courts. (App. 1-46). In its brief, Campus argued that the Legislature violated Article I, Section 24 of the Florida Constitution by enacting the Florida Act, and that the Florida Act could not be applied retroactively. (R.App. 25-40). The District Court of Appeal, in certifying the question: "Is Section 406.135 constitutional?" referred to the constitutionality of the Florida Act under state – not

federal – law because its decision focused solely on Florida constitutional law. (App. 27).

Second, Campus has misconstrued the Florida Act. (Pet. at 4-5). The Florida Act does *not* prohibit access to autopsy information. (App. at 8). The autopsy report, including its detailed findings, remains public. (App. at 8). The Florida Act limits only the public dissemination of autopsy photographs,[2] and restricts such dissemination to those who demonstrate good cause before a court. Fla. Stat. § 406.135(2)(a).

Similar to judicial pronouncements of this Court and other federal courts, the Florida Legislature provided for disclosure of autopsy photographs on a showing of "good cause" for their production, with that "good cause" to be ascertained after considering: 1) whether disclosure is necessary so the public can evaluate the government's performance; 2) the seriousness of the intrusion into the surviving family's right to privacy; 3) whether disclosure is the least intrusive method available; and 4) the availability of similar information in other public records regardless of form. Fla. Stat. § 406.135(2)(a). The Legislature adopted this limited exemption under its state constitutional authority. Article I, Section 24, Florida Constitution, allows the Legislature to create exemptions to Florida's public records law if two conditions are met: the law states with specificity the public necessity justifying the exemption, and the exemption is no broader than necessary to

[2] A right to immediate disclosure of such photographs remains with a surviving spouse and certain delineated family members, and governmental agencies in furtherance of their official duties. Fla. Stat. § 406.135(1).

accomplish the stated purpose of the law. The District Court of Appeal's judgment affirmed the trial court's order concluding that the exemption created by the Florida Act meets these state constitutional requirements. (App. 27).

Third, Campus' unsupported statement that the autopsy photographs would disclose valuable information that could have saved the life of another racecar driver (Pet. at 21 n.21) is contradicted by the actual record developed below. The record below was not disputed: the autopsy photographs added *nothing* to the written autopsy report already previously published (App. 26), and the uncontradicted testimony established that the photographs at issue were not even of diagnostic quality (App. 24).

Fourth, Campus was not denied access to the autopsy photographs because of its viewpoint. (Pet. at 17). Campus was denied access because it failed to show good cause as required by the Florida Act. (App. 26). Campus' failure to show good cause did not implicate its viewpoint. *Indeed, as Campus concedes at page 10 of its petition, it "chose not to offer any testimony from its reporters or editors."* Instead, it chose to rely upon testimony of a police photographer, the medical examiner, Teresa Earnhardt and numerous newspaper articles by publishers *other* than Campus in order to try to show its own "good cause" for obtaining access to the autopsy photographs. (Pet. at 10). The newspaper articles were rejected by the trial court as inadmissible hearsay. (R.App. 21-22). Since Campus chose not to even offer its own "viewpoint," its First Amendment rights (contrary to its assertions) could *not* be implicated. In fact, since Campus chose to rely upon its counsel's legal argument rather than introducing direct testimony of its

"viewpoint," there was *no* basis for the state court to even consider Campus' "viewpoint."

The District Court of Appeal affirmed the trial court's finding that Campus' unsupported arguments, based on rank speculation about NASCAR safety, were without merit and implicated no governmental interest. (App. 34-35). In fact, according to the trial court, these arguments "were thinly veiled excuses to gain access to the court either for the purpose of arguing the constitutionality of the statute or for making a profit at the expense of [the Earnhardt] family. They are strained arguments and are entirely too tenuous for realistic discussion." (App. 35).[3]

Campus' petition asserts, with no record support, that its "viewpoint" was "that information contained in the photographs (but not necessarily the photographs themselves) should be published in the event that they showed that Earnhardt had died due to NASCAR's failure to

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[3] The court's conclusion is supported by this Court's decision in *U.S. Dep't of State v. Ray*, 502 U.S. 164 (1991). In *Ray*, a Freedom of Information Act requester sought unredacted interview reports of returned Haitian nationals, allegedly to verify whether the government's finding that the returned nationals were not subject to retaliation was correct. In the absence of record evidence "impugn[ing] the integrity of the reports," however, this Court was "unmoved by respondents' asserted interest in ascertaining the veracity of the [government's] interview reports." *Id.* at 179. The Court reasoned that, "[i]f a totally unsupported suggestion that the interest in finding out whether Government agents have been telling the truth justified disclosure of private materials, Government agencies would have no defense against requests for production of private information." *Id. See also, U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 774 (1989) (allegations that an alleged crime figure "had improper dealings with a corrupt Congressman" were not sufficient to overcome the privacy interest in a rap sheet).

require its drivers to use a head and neck restraint system." (Pet. at 13). Campus never even offered its own testimony, much less this "viewpoint," into the record below.

Finally, Campus neglects to advise this Court as to the interest of intervenor Michael Uribe. Campus describes him merely as a "web master," but omits to advise this Court that Michael Uribe's for-profit web site publicizes, among other things, celebrity autopsy photographs (App. 33), including the autopsy photographs of NASCAR drivers Neil Bonnett and Rodney Orr. (App. 16). The trial court determined that given Dale Earnhardt's popularity, "[i]t is a virtual certainty that these particular autopsy photographs would be posted on one or more of these web sites for immediate, worldwide viewing if they became publicly available." (App. 33).

SUMMARY OF THE ARGUMENT

Campus' petition should be denied because no federal constitutional issues were properly presented to, or addressed by, any of the three state courts below. Campus never pursued the ancillary federal issues set forth in its cross-claim filed in state circuit court, and then abandoned these issues altogether in the intermediate appellate court that entered the judgment Campus asks this Court to review. (R.App. 1-57). Until Campus filed its petition for certiorari in this Court, Campus had focused its appellate challenges exclusively upon Florida constitutional law.

Moreover, Campus has offered *no* compelling reasons for this Court to grant its petition. Not one of the considerations governing this Court's decision to grant certiorari

review, as set forth in Supreme Court Rule 10, is applicable here. Certainly, there is no conflict between the judgment of the District Court of Appeal and any decision of this Court. Two decisions relied upon by Campus – *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999) ("*LAPD*") and *U.S. v. American Library Ass'n, Inc.*, 123 S.Ct. 2297 (2003) ("*American Library*") – actually *support* the judgment entered by the District Court of Appeal. Accordingly, Campus' petition should be denied.

REASONS FOR DENYING REVIEW

I. Campus' Petition Should Be Denied Because Its Federal Claims Raised Here Were Neither Addressed By, Nor Properly Presented To, The Intermediate State Appellate Court That Rendered The Decision This Court Has Been Asked To Review.

Campus seeks review of the judgment entered by an intermediate appellate state court under 28 U.S.C. § 1257. As applied to the circumstances of this case, that statute requires that petitioner "specially set up or claimed [in the state courts] under the Constitution . . . of . . . the United States," that right which it now seeks to have this Court enforce. 28 U.S.C. § 1257(a). Accordingly, Supreme Court Rule 14.1(g)(i) requires a petitioner seeking review of a state-court judgment to specify, among other things, "when the federal questions sought to be reviewed were raised" in the state court system and "the method or manner of raising them and the way in which they were passed on by those courts . . . so as to show that the federal question was timely and properly raised and that this Court has

jurisdiction to review the judgment on a writ of certiorari." Supreme Court Rule 14.1(g)(i).

This Court rarely, if ever, accepts a case for review where the petitioner's federal claims were not properly presented to the state court below:

> With 'very rare exceptions,' . . . we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.

Campbell v. Louisiana, 523 U.S. 392, 403 (1998), quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*) (in relevant part refusing to address the issue of petitioner's "fair-cross-section claim" because petitioner failed to show the issue was properly presented to the Louisiana appellate courts); *see also Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

It is thus a long and settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Webb v. Webb*, 451 U.S. 493, 497 (1981), citing *People of State of New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *F.G. Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897).

Here, Campus seeks review of the District Court of Appeal's judgment on alleged federal constitutional issues, even though the judgment neither passes upon nor even addresses any federal constitutional claim. Moreover, Campus

has not met (because it cannot) its burden of showing that its federal constitutional issues were properly presented to the District Court of Appeal. This is critical because "when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (in turn quoting *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974) (in turn quoting *Street v. New York*, 394 U.S. 576, 582 (1969). Campus' petition fails to do so.

Campus had several ways to satisfy its jurisdictional requirement. For example, Campus could have shown its federal claims were raised "at the time and in the manner required by the state law," *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988), or it could have demonstrated that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment. *See Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982). Campus also could have demonstrated that it presented its federal claims "with fair precision and in due time." *People of State of New York ex rel. Bryant*, 278 U.S. at 67; *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980). Campus did none of these.[4]

[4] The only "federal issue" addressed by Campus in the District Court of Appeal was in response to the federal right to privacy argument made by Teresa Earnhardt. (R.App. 46-54).

Campus' brief to the District Court of Appeal makes clear that it had abandoned its alleged federal law issues. (R.App. 1-57). There is no federal issue identified in the table of contents to the brief, and no mention of any federal issue anywhere in the text of the brief (other than its response to the federal right to privacy argument made by Teresa Earnhardt). (R.App. 1-57). No federal issue is identified in the required "statement of issues" on appeal to the District Court of Appeal. *See Beck v. Washington*, 369 U.S. 541, 552-53 (1962) (in relevant part refusing to address federal equal protection argument that had not been properly presented to the state appellate court in accordance with state law); *see also*, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 n.6 (1968). At the beginning of its brief below, Campus asserts that the Florida Act is unconstitutional for only two reasons: its retroactive application as a possible violation of Florida constitutional law, and its failure to comply with Article I, Section 24, Florida Constitution (R.App. 25-40). The text of its argument focuses *only* on those issues; indeed, only in two lengthy *footnotes* does Campus even suggest other constitutional deficiencies with the Florida Act. (R.App. 31 n.13) (First Amendment and Equal Protection), (R.App. 39 n.18) (unlawful delegation of authority). Campus refers to *LAPD (*the principal decision upon which it bases its petition to this Court) only once, and that is in one of those two footnotes (R.App. at 31 n.13).

Under well-established Florida law, Campus did not present these federal constitutional issues to the District Court of Appeal for its review. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 41 n.1 (Fla. 3d DCA 1996) ("It is

elementary that arguments which are not made as a point of appeal, as here, but are found only in a footnote in the appellant's brief, are not properly presented to the appellate court for review.") (citation omitted); *Kaufman v. Bernstein*, 100 So. 2d 801, 803 (Fla. 1958) (accord). Indeed, the federal claims on which Campus now bases its petition were presented to the District Court of Appeal only by amicus curiae, whose brief included ten pages of argument on these ancillary points. However, under Florida law, new issues may *not* be raised by amicus curiae, and thus these ancillary issues were *not* properly presented to the appellate court for review. *See Acton v. Ft. Lauderdale Hosp.*, 418 So. 2d 1099, 1101 (Fla. 1st DCA 1982) (amici may not interject issues not raised by the parties on appeal); *Turner v. Tokai Fin. Servs., Inc.*, 767 So. 2d 494, 496 n.1 (Fla. 2d DCA 2000) (same); *Higbee v. Housing Auth. of Jacksonville*, 197 So. 479, 485 (Fla. 1940) (same).

This Florida rule is fully consistent with that of this Court, which will not consider an argument advanced by amicus curiae when that argument was not raised or passed on below and was not advanced in the court below by the party on whose behalf the argument is now being raised. *See United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 531 n.13 (1979); *Knetsch v. U.S.*, 364 U.S. 361, 370 (1960). This Court should make no exception here.

Moreover, when reviewing state court decisions, this Court has consistently refused to decide federal constitutional issues raised for the first time in this Court. *Webb*, 451 U.S. at 498-99; *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Moore v. Illinois*, 408 U.S. 786 (1972).

Campus' federal constitutional claims are simply not properly before this Court, and accordingly, Campus' petition should be denied.

II. The Judgment Of The District Court Of Appeal Is Not In Derogation Of Decisions Of This Court.

Campus contends that the judgment of the District Court of Appeal upholding the constitutionality of the Florida Act under state law is in derogation of this Court's decisions in *LAPD* and *American Library*. Campus' arguments are without merit.

A. The Judgment Is Not In Violation Of This Court's Decision In *LAPD*, But Rather Supports Rational Limitations On Public Access To Sensitive Personal Information.

According to Campus, "a majority of the Justices," or what Campus refers to as "the Court," made "clear that a state cannot constitutionally condition access to its records on the viewpoint of the requestor" in *LAPD*. (Pet. at 14-15). Campus is wrong on multiple levels. First, "the Court" made no such holding in *LAPD*; nor did "a majority of the Justices" make any such holding. This Court held in *LAPD* that a private publishing service lacked standing to bring a facial challenge on behalf of third parties to a statute restricting public dissemination of arrestees' addresses, where the publishing service faced no threat of prosecution or cutoff of funds, and where the statute did not abridge anyone's right to engage in speech, be it commercial or otherwise, but simply regulated access to information in the hands of a police department as to arrestees' addresses. *LAPD* at 39-41. The "statement" attributed by

Campus to "the Court" derives from dicta in a *concurrence*, which dicta is then quoted by one of the *dissenting* opinions. Such dicta is not attributable to "the Court," nor is it relevant to the holding of the case.

The issue in the instant case is access to information. As the Court made clear, there is a fundamental difference between access to government information and the right to speak:

> This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995). The California statute in question merely requires that if respondent wishes to obtain the addresses of arrestees it must qualify under the statute to do so. Respondent did not attempt to qualify and was therefore denied access to the addresses. For purposes of assessing the propriety of a facial invalidation, what we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment.

Id. at 40. The Court further noted that although the respondent also challenged the statute as a violation of equal protection under the Fourteenth Amendment, the lower court had not passed on that challenge (as in this case), and thus this Court did not address that issue. *Id.* at 40 n.2.

There is no federal constitutional right of access in the First Amendment, and Campus' argument that there can be no restrictions on access to governmental information is

fatally flawed. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978); *Zemel v. Rusk,* 381 U.S. 1 (1965). The concurrence by Justice Ginsburg in *LAPD*, on which Campus purports to rely, makes clear that states may allow *selective* access to government information. *LAPD* at 43. Similarly, the dissent by Justice Stevens upon which Campus relies *specifically acknowledges* that states may limit disclosure based upon a legitimate need for the information: *"Moreover, I think it equally clear that California could release the information on a selective basis to a limited group of users who have a special, and legitimate, need for the information." Id.* at 45 (emphasis added). This is exactly what the Florida statute does: it allows access to autopsy photographs to those who can show good cause to see them before a state court.

Thus, the cobbled "statement" taken out of context and attributable to four Justices in *LAPD* simply does not *support* Campus' argument, but belies it.[5] As the Sixth Circuit has subsequently held (following remand by this Court for further consideration on the basis of *LAPD*) in an as-applied challenge brought by attorneys and chiropractors, a statute restricting access to and dissemination of motor vehicle accident reports does *not* violate free speech or equal protection rights. *See Amelkin v. McClure*, 330 F.3d 822 (6th Cir. 2003). The Florida statute likewise responds to this Court's holding in *The Florida Star v.*

[5] Campus' reliance upon *LAPD*, no matter how misplaced, is very recent. Until filing its petition with this Court, Campus referred to *LAPD* only in one footnote in its brief to the Florida Supreme Court (R.App. 101 n.20), and likewise in only one footnote in its brief to the District Court of Appeal (R.App. 31 n.13).

B.J.F., 491 U.S. 524, 534 (1989), that government has the ability and duty "to forestall or mitigate the injury caused by release of sensitive personal information by classifying that information."

Indeed, if Campus' radical argument were accepted, there could be *no* exemptions from any state open records law and *no* restrictions upon the disclosure of any government information, even under the Federal Freedom of Information Act ("FOIA"). Campus is *wrong*, however. FOIA was not intended to afford the general public a right of access to the vast amount of "information about *private citizens* that happens to be in the warehouse of the Government," *Reporters Comm.*, 489 U.S. at 774 (emphasis in original). Accordingly, this Court has repeatedly upheld the FOIA exemptions, recognizing not only that "public disclosure is not always in the public interest," but that Congress has specifically provided that agency records may be withheld if they fall within one of FOIA's exemptions. *C.I.A. v. Sims*, 471 U.S. 159, 166-67 (1985). Exemption 7(C), which exempts from disclosure any materials that "could reasonably be expected to constitute an invasion of privacy that is unwarranted," has been consistently upheld by this Court against challenges. *Ray*, 502 U.S. at 171; *Reporters Comm.*, 489 U.S. at 756.

In fact, Campus' argument contradicts the important values that the First Amendment seeks to protect. The influential pre-revolutionary essayist Cato wrote in his Letters, "Freedom of speech is the great bulwark of liberty," adding "[w]ithout Freedom of thought, there can be no such thing as wisdom; and no such things as publick liberty, without freedom of speech: Which is the right of every man, *as far as by it he does not hurt and control the right of another*; and this is the only check which it ought

to suffer."[6] The founding fathers understood that protecting freedom of speech and the press is an important means of securing individual liberty in our democratic society.[7] However, to sacrifice individual liberty, as Campus attempts to do, in the name of an unlimited right to access highly personal information about a private individual is to sacrifice the ultimate value for the means of obtaining it.

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[6] John Trenchard & Thomas Gordon, CATO'S LETTERS, No. 15, Feb. 4, 1720, 110, 114 (Ronald Hamowy, ed., Liberty Fund, 1995) (emphasis added).

[7] Advocating the inclusion of the Bill of Rights in our Constitution, James Madison cautioned:

> Wherever the real power of government lies, there is a danger of oppression. In our Government, the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended not from acts of Government contrary to the sense of its Constituents but from acts in which the Government is the mere instrument of the major number of Constituents.

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 5 THE WRITINGS OF JAMES MADISON 271-72 (Gaillard Hunt, ed., 1904). Thus, Madison believed that the Bill of Rights, including the First Amendment, was essential to protect certain fundamental individual liberties from being sacrificed to the majority will. Yet, when Campus touts the First Amendment in order to use the state as a vehicle to access information concerning a private individual, information to which the press would have no access without exercising state authority, it seeks to have the First Amendment accomplish exactly what Madison warned against. Campus does not seek just to *publish* autopsy photographs, but to manipulate the First Amendment into subordinating the rights of private, individual citizens in the name of an unlimited right to *access* autopsy photographs for which it has demonstrated *no* governmental accountability needs. This manipulation contradicts the spirit of our First Amendment as the bulwark of our freedom.

Campus seeks to use the First Amendment not as a right to publish information, but as a vehicle through which it can co-opt government power to access personal information about private individuals within the state's control. Under Campus' interpretation, the First Amendment ceases to be a bulwark of freedom, and instead turns it into a nuclear warhead used to eradicate the very freedom it was meant to protect.

The Florida Act challenged by Campus below imposes restrictions upon access to government information that are not substantially different from those imposed by the California statute at issue in *LAPD*. Like *LAPD*, the Florida Act limits the disclosure of certain government information based upon the status of the requestor. Florida is even more liberal than California in permitting access; while the California statute limits access only to certain select classes of requestors, the Florida Act permits access to autopsy photographs to anyone who can show a court good cause for such access. Campus' contention that having to show "good cause" to a judge somehow results in illegal viewpoint discrimination is simply frivolous.[8]

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[8] The requirement to show "good cause" before a court is a well established test used frequently in both state and federal law. *See* Fla. Stat. § 119.07(7)(a) (establishing a "good cause" standard governing requests for release of otherwise confidential information in investigations of child abuse, neglect or exploitation). *See also*, Fed.R.Civ.P. 26(c) (allowing trial court to restrict release of information obtained in discovery). In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36-37 (1984), this Court found that no heightened First Amendment scrutiny was required for protective orders issued at the discretion of the trial court, prohibiting the release of sensitive information obtained through

(Continued on following page)

Indeed, as this Court has noted, FOIA Exemption 7(C) requires a court to balance the public and private interest, and the court is required to consider the extent to which disclosure of the requested documents would "contribute significantly to public understanding of the operations or activities of government." *Reporters Comm.*, 49 U.S. at 775. Moreover, it is the requestor that bears the burden of "identify[ing] with reasonable specificity the public interest that would be served by release." *Hale v. U.S. Dep't of Justice*, 973 F.2d 894, 900 (10th Cir. 1992), *vacated and remanded on other grounds*, 509 U.S. 918, *reinstating judgment in relevant part*, 2 F.3d 1055, 1057 (10th Cir. 1993). The purpose of FOIA, as the purpose of state public records laws, is to foster governmental openness and accountability, not to disclose information about private citizens. *Reporters Comm.*, 489 U.S. at 774-75. FOIA exemptions that have been upheld by this Court are no different from the Florida public records exemption for autopsy photographs.

Thus, the Florida Act, as applied to Campus, is constitutional if it satisfies the requirements of the equal protection clause – that is, the Florida Act must rationally further a legitimate state interest. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[i]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.") Florida courts have found that the Florida Act meets these requirements under state law.

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pre-trial discovery "for good cause shown," under the Washington equivalent of Rule 26(c).

B. The District Court Of Appeal's Judgment Does Not Violate This Court's Decision In *American Library*.

The judgment of the District Court of Appeal is also not in derogation of this Court's decision in *American Library*. Once again, Campus has misconstrued this Court's holding, relying on one concurring Justice and three dissenting Justices to support its contention that any restriction upon access to materials in a library "must be subjected to strict or intermediate scrutiny." (Pet. at 19). But *American Library* held that First Amendment forum principles, including those requiring strict scrutiny of an alleged restriction on speech, simply did not apply to an analysis of the First Amendment validity of the Children's Internet Protection Act, under which a public library could not receive federal assistance to provide Internet access unless it installed software both to block images that constitute obscenity or child pornography and to prevent minors from obtaining access to material that was harmful to them, as Internet access in public libraries was neither a traditional nor a designated public forum. *American Library* at 2304.[9]

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[9] In a recent decision, the Fourth Circuit held that an otherwise-permissible status distinction restricting the scope of a limited public forum is valid even if it incidentally affects an activity that constitutes the exercise of a fundamental right by the speaker. *Goulart v. Meadows*, 345 F.3d 239, 261 (4th Cir. 2003). The Court went on to find that while a "'restriction must not discriminate against speech [or speaker] on the basis of view point,' the *restriction is permissible* so long as it is reasonable in light of the purpose served by the forum." *Id.* at 259 (emphasis added) (quoting *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106-07 (2001)).

Campus' attempt to analogize public library materials with the "library" of government records is unavailing. (Pet. 19-21). This Court has found that while public libraries provide materials for "the interest, information and enlightenment" of their patrons, governmental entities provide access to public records to assure governmental accountability. *American Library* at 2304. Public libraries properly have wide discretion to make content-based judgments in deciding what materials to provide their patrons and thus to the extent Campus argues that public records are analogous to library materials, a governmental entity would have the same broad discretion in *selecting* those materials to be made available to the public. *Id.* at 2305.

Campus failed to bring *American Library* to the attention of the Florida Supreme Court. Certainly, if Campus believed that *American Library* somehow controlled the case below, it had an obligation, once that decision issued, to bring it to the attention of the Florida Supreme Court in a notice of supplemental authority.

III. Campus' Contention That The Florida Act Should Be Stricken Because It Has Become A Model For Other States Is Without Merit And Relies Upon Materials Not A Part Of The Record Below.

Finally, Campus asks that this Court review the District Court of Appeal's judgment because the Florida Act has allegedly "become a model" for states to restrict access to autopsy photographs which were previously subject to public disclosure. Campus' argument not only lacks legal merit, but it also improperly relies extensively upon materials outside the record. The pending matter in

this Court of *Office of the Independent Counsel v. Favish*, No. 02-954, *cert. granted*, 123 S.Ct. 1929 (May 5, 2003) is *not* a part of the record in *this* case, nor is the amicus brief filed therein by Teresa Earnhardt part of the record in *this* case. Campus has nonetheless spent several pages of its petition "responding" to issues raised in the pending *Favish* appeal and criticizing the Earnhardt amicus brief filed in *that* case. (Pet. at 21-29).

Certainly whether or not other states have adopted restrictions upon the public disclosure of autopsy photographs is *not* properly before this Court. Moreover, while the *Favish* appeal *is* pending before this Court, Campus' attempt to argue about that appeal in this petition is patently improper. Moreover, as it did below, Campus supports its arguments with references to websites and newspaper articles, none of which were admissible evidence below, and several of which even post-date the District Court of Appeal's judgment. (Pet. at 9 n.5; 18 n.14; 21 n.21; 22 n.24; 23 n.26; 25 n.31; and 28 n.37). Campus' argument should be disregarded.

CONCLUSION

The Earnhardt family respectfully requests that Campus' petition for certiorari be denied.

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